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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 3, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554-

Re: MM Docket No. 93-191
RM-8088
Pueblo, Colorado

Dear Mr. Caton:

Transmitted herewith, on behalf of Central Wyoming College, are an original and four copies of the "Comments of Central Wyoming College" with regard to the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,

Anne Goodwin Crump
Anne Goodwin Crump
Counsel for
Central Wyoming College

Enclosures

cc: Nancy Joyner, Esquire (with enclosure) **By Hand Delivery**

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Federal Communications Commission

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WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	MM DOCKET NO. <u>93-191</u>
)	
Amendment of Section 73.606(b),)	RM-8088
Table of Allotments,)	
TV Broadcast Stations.)	
(Pueblo, Colorado))	

Directed to: Chief, Allocations Branch

COMMENTS OF CENTRAL WYOMING COLLEGE

Central Wyoming College ("CWC"), by its attorneys, hereby respectfully submits its Comments with regard to the Notice of Proposed Rule Making, DA 93-742, released July 13, 1993 ("NPRM"), in the above-captioned proceeding. With respect thereto, the following is stated:

1. CWC is an applicant for a new noncommercial television station to operate on Channel *8 at Laramie, Wyoming (File No. BPET-921210KE). The NPRM proposes to allow an exchange of channels between the University of Southern Colorado ("USC"), licensee of noncommercial educational station KTSC(TV), Channel *8, Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of commercial station KOAA-TV, Channel 5, Pueblo. The NPRM further proposes that the exchange be authorized at the stations' currently licensed transmitter site on Baculite Mesa. This site is fully spaced to both the Laramie reference co-ordinates and to the proposed transmitter site specified in CWC's pending application.

2. SCC, however, has indicated that it would prefer to

operate Station KOAA-TV on Channel 8 from Cheyenne Mountain at a site specified in a construction permit previously granted to USC. This site, however, is short-spaced to both the Laramie reference co-ordinates and CWC's proposed transmitter site.

3. Accordingly, CWC strongly favors the Commission's proposal in the NPRM to authorize any channel exchange only at the Baculite Mesa site. CWC has no opinion as to the merits of the channel exchange as such. Nevertheless, for the reasons set forth in its "Opposition to Joint Petition to Deny," filed March 31, 1993, a copy of which is attached hereto as Exhibit 1, CWC opposes SCC's request that it be authorized to operate commercial station KOAA-TV from the short-spaced Cheyenne Mountain site.

4. For a number of years, CWC has been formulating its plans to expand its noncommercial educational television service to the State of Wyoming by acquiring an authorization for Channel *8 at Laramie. CWC's proposed station would provide first over-the-air noncommercial television service to a substantial portion of southeastern Wyoming, including the state capital, Cheyenne.

Therefore, CWC vigorously opposes any proposal that could impair its ability to provide noncommercial educational television service to the citizens of Wyoming.

Respectfully submitted,
CENTRAL WYOMING COLLEGE

By: Richard Hildreth
Vincent J. Curtis, Jr.
Anne Goodwin Crump

Its Attorneys

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11th Floor
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Rosslyn, Virginia 22209
(703) 812-0400

September 3, 1993

EXHIBIT 1

Opposition to Joint Petition to Deny
(Exhibits Omitted)

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
)
CENTRAL WYOMING COLLEGE)
)
For Construction Permit for a)
New Noncommercial Educational)
Television Station to Operate on)
Channel *8 at Laramie, Wyoming)

File No. BPET-921210KE

Directed to: Chief, Mass Media Bureau

OPPOSITION TO JOINT PETITION TO DENY

Richard Hildreth
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March 31, 1993

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SUMMARY

Central Wyoming College ("CWC") herein submits its Opposition to the Joint Petition to Deny its application for a construction permit for a new noncommercial educational television station at Laramie, Wyoming, filed by the University of Southern Colorado ("University") and Sangre de Cristo Communications, Inc. ("SCC") on March 16, 1993. University is the licensee of KTSC(TV), a non-commercial educational television station licensed to Pueblo, Colorado, and operating on Channel *8. SCC is the licensee of KOAA-TV, a commercial station operating on commercial Channel 5 and also licensed to Pueblo, Colorado. Although CWC's proposed facilities would be fully spaced to KTSC(TV)'s currently licensed site, University and SCC have petitioned to deny CWC's application because CWC's site would be short-spaced to a site on Cheyenne Mountain authorized in a construction permit held by University. Commercially operated SCC opposes CWC's application on the basis that it has proposed a channel swap with University and hopes to acquire the currently noncommercial construction permit for its own use. The objections raised by University and SCC are entirely without merit.

CWC's proposed facilities actually are fully spaced to University's licensed facilities. While CWC's proposed facilities would be short-spaced to the facilities in University's Cheyenne Mountain construction permit, that permit is no longer viable. University has indicated that it has abandoned its plans to construct and it has not provided

sufficient reasons for an extension of the permit. Furthermore, it is doubtful that the Commission will approve a channel exchange that would allow SCC to build the proposed facilities. Accordingly, no waiver of the Commission's spacing rules is required. Even if the construction permit were viable, CWC has demonstrated that a waiver of the Commission's spacing rules is warranted. It will provide equivalent protection to the proposed KTSC facilities, and terrain shielding will eliminate the possibility of harmful interference. Further, fully spaced sites would be impractical, and significant public interest benefits would accompany use of the proposed site.

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BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Application of)
CENTRAL WYOMING COLLEGE) File No. BPET-921210KE
For Construction Permit for a)
New Noncommercial Educational)
Television Station to Operate on)
Channel *8 at Laramie, Wyoming)

Directed to: Chief, Mass Media Bureau

OPPOSITION TO JOINT PETITION TO DENY

Central Wyoming College ("CWC"), by its attorneys, hereby respectfully submits its Opposition to the Joint Petition to Deny its above-captioned application for a construction permit for a new noncommercial educational television station at Laramie, Wyoming, filed by the University of Southern Colorado ("University") and Sangre de Cristo Communications, Inc. ("SCC") on March 16, 1993. With respect thereto, the following is stated:

I. BACKGROUND

1. University is the licensee of KTSC(TV), a non-commercial educational television station licensed to Pueblo, Colorado, and operating on Channel *8. SCC is the licensee of KOAA-TV, a commercial station operating on commercial Channel 5 and also licensed to Pueblo, Colorado. Although CWC's proposed facilities would be fully spaced to KTSC(TV)'s currently licensed site, University and SCC have petitioned to deny CWC's application because CWC's site would be short-spaced by 15.7 kilometers to a

site on Cheyenne Mountain authorized in a construction permit held by University, the initial term of which has now expired. University objects to a waiver of Commission's spacing rules to allow CWC to build its proposed new educational facility based on University's authorization for the Cheyenne Mountain site. Commercially operated SCC opposes CWC's application on the basis that it has proposed a channel swap with University and hopes to acquire the currently noncommercial construction permit for its own use. The objections raised by University and SCC are entirely without merit.

II. CWC PROPERLY REQUESTED A WAIVER OF SECTION 73.610

2. The Petitioners first claim that CWC's application should be dismissed because CWC did not request a waiver of Section 73.610 of the Commission's Rules. While the Petitioners are literally correct that CWC did not in so many words request a waiver of Section 73.610, this argument is an attempt to elevate form over substance, since CWC scrupulously followed the directions in the Commission application form. FCC Form 340, used by noncommercial educational applicants, at Question 13, asks whether the proposed facilities comply with Section 73.610. If the "No" block is checked, the application form requests an exhibit providing a justification.¹ In this instance, CWC checked the box marked "No" and referenced Exhibit VC-13 and the Engineering Report text. In the Engineering Report text, Section 2(b) is entitled "Short-

¹ At no time does the OMB approved form request or require a separate waiver request.

Spacing to KTSC-TV" and provides the justification for this short-spacing. Thus, while CWC did not use the words "a waiver of Section 73.610 is requested," its engineering exhibit not only fully responded to the question on the application form, but also discussed and provided justification for the short-spacing, and made it clear that a waiver was requested. Moreover, the exhibit does explicitly request a waiver, although of Section 73.685(e) rather than Section 73.610. The context of the request makes it clear, however, that the request relates to spacing requirements and simply miscited the rule. See Engineering Statement, attached hereto as Exhibit 1. Thus, a dismissal of CWC's application on the grounds that it merely answered the question on the form and did not use particular magic words to request the waiver would be patently unreasonable and legally unsupportable.

III. NO WAIVER OF SECTION 73.610 IS REQUIRED BECAUSE
THE KTSC CONSTRUCTION PERMIT INVOLVED IS NO LONGER VIABLE

A. CWC's Proposal is Fully Spaced to KTSC's Licensed Site and is Short-Spaced Only to a Non-Viable Construction Permit.

3. University does not dispute that CWC's proposed facilities are fully spaced to KTSC's licensed site. The site causing the short-spacing arose from a January 1990 application filed by University for construction permit to modify the facilities of KTSC, which proposed to move the KTSC transmitter site to Cheyenne Mountain (FCC File No. BPET-900122KE). In that application, University acknowledged that its facility would be 13.0 kilometers short-spaced to the Channel 7 allocation at Laramie and requested

a waiver of the spacing rule. In support of that request, University argued that it was important for KTSC to be able to serve Colorado Springs as well as Pueblo, its city of license, that fully-spaced sites were not suitable to obtain this coverage, that no TV translator channels were available, and that the mountainous terrain eliminated the possibility of objectionable interference to a future Laramie station. On February 28, 1991, the Commission granted University's application, and the initial term of the construction permit expired February 28, 1993. Two years later, without any construction undertaken, University filed an application for extension of construction permit (FCC Form 307), even though intervening events demonstrate that the authorization is no longer viable.

B. The University of Southern Colorado Has Abandoned Its Intent to Build the Facilities Authorized by the Construction Permit.

4. First and foremost, University has indicated that it does not intend to build the facilities authorized by its construction permit. On September 3, 1992, University and SCC issued a joint press release stating that they had reached an agreement to exchange channels, and that SCC would pay the University \$1 million "in exchange for the Channel 8 signal." See Exhibit 2. The press release further noted that although the Commission had approved a plan for KTSC to move to Cheyenne Mountain, University had been "unable to build the necessary transmission facilities there." Id. On September 8, 1992, University and SCC jointly filed a "Petition for Issuance of Notice of Proposed Rulemaking to Exchange

Channels." See Exhibit 3. This proposal to exchange channels clearly demonstrates that University does not intend to go forward with construction at Cheyenne Mountain.

5. Moreover, pleadings subsequent to the University/SCC Petition confirm the indication in the press release that University has been unable, apparently on financial grounds, to construct its proposed facilities. In December 1992, Pikes Peak Broadcasting Company ("Pikes Peak"), licensee of Stations KRDO-TV, Colorado Springs, Colorado, and KJCT-TV, Grand Junction, Colorado, and KKTU, Inc. ("KKTU"), licensee of Station KKTU(TV), Colorado Springs, Colorado, each separately filed a Petition for Issuance of Order to Show Cause, requesting that the Commission issue an order to show cause why University's Cheyenne Mountain construction permit should not be revoked.² In their Joint Consolidated Opposition to Petitions for Issuance of Order to Show Cause ("Joint Consolidated Opposition"), filed January 8, 1993, University and SCC specifically state that budgetary constraints had impeded University's ability to construct its proposed Cheyenne Mountain facilities. See Exhibit 4. This pleading also refers to KTSC as "a financially-strapped non-commercial station." Joint Consolidated Opposition at 20. University further stated that "[a]s a result, the University considered other means by which it could improve the quality and geographic reach of its service...."

² Pikes Peak filed its Petition on December 2, 1992. KKTU filed its Petition on December 4, 1992.

Id. (emphasis added). Thus, University has itself indicated that, because of financial constraints, its decided to seek other options rather than to proceed with the Cheyenne Mountain construction.

6. In an obviously contradictory position, University has recently indicated that it had at one time the funds to construct the station, as it received an NTIA Public Telecommunications Facilities Program grant for this purpose in September 1991. This was brought out in a supplement to its application for extension of the construction permit, filed March 23, 1993, wherein University indicated that it received approval of a grant in the amount of \$386,007 in September 1991. See Exhibit 5. While this new revelation undercuts the previously offered rationale of its financial inability for failing to construct the station (and therefore should result in a denial of the pending application to extend the construction date), it does not change the fact that University has not built its proposed facilities and has affirmatively indicated that it does not intend to do so.³ Indeed, if the University has had the funds to construct the station since September 1991, this fact merely underscores that the University's

³ This recent statement on the NTIA grant does call into question University's previous statements to the Commission concerning its financial difficulties and inability to construct because it was financially strapped. According to University's latest statement, it is not financial considerations that have impeded its ability to construct and have led it to consider other options. This is contrary to its earlier representations. If it was not financial reasons that prevented the University from building (and to date no other reasons have been forthcoming), what was the reason and why did the University misstate its problem?

failure to construct has been a matter of choice rather than inability. Clearly, the University has indicated that it has deliberately chosen not to construct its Cheyenne Mountain facilities and does not intend to itself construct them in the future. Therefore, the construction permit must be considered to be effectively abandoned by University.

7. University has recently claimed that it has not abandoned its construction permit, but rather "if the Commission does not approve the swap, the University intends to implement the Permit." "Joint Opposition to Petition to Revoke and Deny CP Extension," filed March 4, 1993, at 9. See Exhibit 6. This claim rings hollow, however, and it is doubtful whether University actually means that it plans to build in accordance with its construction permit. More importantly, why did University not build the station in the last two years?

8. University's first specific statement that it might "implement" the construction permit itself if the channel exchange is not approved came in its March 4, 1993 Joint Opposition. This Joint Opposition was filed in response to a "Petition to Revoke and Deny CP Extension," filed by Pikes Peak on February 19, 1993, which pointed out that University does not intend to proceed with construction. In previous pleadings, University indicated that if the channel exchange were not approved, it "would likely examine whether there are alternative means of improving service to Colorado Springs...." Exhibit 4, "Joint Consolidated Opposition to Petitions for Issuance of Order to Show Cause" at 6. This

statement was made on January 8, 1993, in response to the argument that University had abandoned its plan to improve KTSC's service to Colorado Springs by going forward with construction on Cheyenne Mountain, and, therefore, the construction permit should be revoked. The logical counter to this argument would have been for University at that time to assert its intent to build. It made no such statement, however, but instead stated that University would seek "alternative means" to improve its signal.⁴ Further, in filing its application for extension of construction permit on FCC Form 307 (File No. BMPET-920216KE), University did not even suggest that there was even a remote possibility that it would go forward with construction if the channel exchange were not approved, much less make a commitment to do so. See Exhibit 7. Only after receiving petitions to deny its extension application did University apparently perceive the weakness of its extension application without such a statement and belatedly provide it. Needless to say, the statement is less than clarifying. Even in its Joint Opposition to Petition to Revoke and Deny CP Extension, University hedged somewhat. For example, in the footnote immediately following its statement that it would "implement" the construction permit, University discussed alternative options for

⁴ As noted above, University received the construction permit on February 28, 1991. The Commission requires permittees to immediately take steps to build. What University did during the last two years is a mystery. To date, the only explanation that they have provided is that they lacked the funds and are now "financially strapped."

implementing its goals, including assignment of its construction permit. See Exhibit 6. Only in its March 23 supplemental statement (over a month after its 307 was filed, approximately one month after the Pikes Peak and KKTU petitions were filed, and 19 days after its initial response) does University make anything approaching an unequivocal statement of its intent to build, and that statement is of limited, if any, value in view of the fact that it was made only under the threat of the loss of the construction permit.

9. All of the above factors make it clear that University has effectively abandoned its construction permit. University has indicated both through its actions and its inactions and also through its statements and its significant failure to make certain statements that it has no intention of building the facilities authorized by the construction permit.

C. University Has Not Provided Sufficient Justification for Extension of its Construction Permit.

10. It is uncontested that the initial term of the construction permit has now expired. Although University has filed an application for extension of construction permit, grant of that application is by no means assured. The Commission has indicated that it will grant an extension of a construction permit only in the circumstances enumerated in Section 73.3534 of the Commission's Rules:

- (1) Construction is complete and testing is underway looking toward a prompt filing of a license application;
- (2) Substantial progress has been made, i.e.,

demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) No progress has been made for reasons clearly beyond the control of the permittee... but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

47 C.F.R. Section 73.3534(b). University's extension application meets none of these criteria. In filing its extension application, University did not, and could not, indicate that any progress whatsoever had been made toward construction. See Exhibit 7. In its supplement to the extension application filed March 23, 1993, University indicated that it had solicited bids from equipment suppliers and considered the bids in 1990, prior to the grant of the construction permit. See Exhibit 5. It does not state, however, that any further action was taken toward acquiring equipment after the construction permit was granted. Additionally, although University states that it conducted site lease negotiations until November 1991 (sixteen (16) months ago), it does not report any further action after that date. University states that the negotiations were put on hold pending the proposed channel exchange, but it does not explain what happened in the intervening ten months between the end of negotiations in November 1991 and the time the channel exchange was proposed in September 1992. Just how long was SCC involved in its negotiations with University?

11. Further, University offered no explanation for its failure to take any meaningful steps toward construction. Its latest now statements indicate that lack of funds was not the

reason for the delay. This is, of course, contrary to its earlier position. But if it is not because of a lack of funds that construction has not taken place, then why? While seeking to walk away from its previous claims of funding problems, University is entirely silent as to what has caused it to not even take the first steps towards building its proposed new facilities (e.g., ordering equipment).

12. The only justification for an extension of the construction permit offered by University is the pendency of the channel exchange proposal. Such a proposal standing alone is not, however, sufficient to support an extension of the construction permit and would make extremely poor precedent for further Commission actions dealing with extension requests. That the proposed channel exchange is, in effect, a proposed sale of the unbuilt construction permit to SCC in return for cash and certain equipment is quite clear. That it has long been well settled that the Commission will not extend a construction permit based solely on a proposed assignment of that permit is also quite clear. Community Service Telecasters, Inc., 6 FCC Rcd 6026 (1991); Construction of Broadcast Stations, 102 F.C.C.2d 1054 (1985); Community Telecasters of Cleveland, Inc., 58 F.C.C.2d 1296 (1976).

13. In addition to saying virtually nothing about any past efforts toward construction, University's extension application on Form 307 is entirely silent about any plans for future construction. Only in its belated March 23, 1993, Supplement does it make any statement as to whether it would go ahead with the

construction if the proposed channel exchange is not approved. Significantly, this Supplement was filed after the Pikes Peak "Petition to Revoke and Deny CP Extension," which pointed out that University does not intend to construct. Clearly the March 23, 1993 statement, contrary to University's previous statements and made only after it perceived a potential threat to the extension of its construction permit, is not reliable and would require a greater degree of specificity than that provided to date.

14. Moreover, University has provided no reason that would prevent it from going forward with construction during the pendency of the channel exchange procedure. The terms of the construction permit are known. This case is not analogous to one in which the permittee hopes to modify its facilities since here no changes in the permit are contemplated other than the identity of the permittee. Assuming, arguendo, that the construction permit were extended, whoever ends up with that permit would need to have the facilities built in accordance with the construction permit.⁵ If the channel exchange were not approved and University retained the construction permit, the facilities would be built and could be operated by University. If the channel exchange were approved, SCC would acquire facilities that had already been built and could simply reimburse University for the construction expenses in

⁵ SCC may well, as suggested buy its "presence" here, move to modify the construction permit in order to eliminate the restrictions limiting the KTSC signal toward Denver.

addition to the funds already promised to University.⁶ Further, if such an arrangement were preferred by the parties, SCC could grant the funds for construction, and those funds could be treated as a loan to University that would be repaid from its NTIA grant if the channel exchange were not approved. Accordingly, the mere pendency of the channel exchange proposal is not a sufficient excuse for University's past failure to build its proposed facilities and its failure to make any commitment to build those facilities in a timely manner in the future.

D. Commission Approval of the Proposed Channel Exchange Is Far From Assured.

15. To date, the only real plan advanced for construction of the facilities authorized by the construction permit is for SCC to build the facilities for its own station, KOAA-TV, pursuant to the proposed channel exchange with KTSC. Approval of the proposed channel exchange that would be necessary for this plan to be implemented is far from assured, however. University obtained its construction permit only through a waiver of the Commission's spacing rules, as its proposed facility is short-spaced to both KJCT(TV), Grand Junction, Colorado, and the Laramie allocation. University stated that the basis for its waiver request was its need to serve Colorado Springs, although Pueblo is its city of license.

16. The Commission's grant of this waiver was explicitly

⁶ One could speculate that if the channel swap were approved, SCC would seek a modification and, therefore, further delay.

based upon KTSC's status as a noncommercial educational station. In the letter granting University's application, the Commission expressly recognized the unique role played by noncommercial stations in providing public television service to wide areas. See Exhibit 8. While the noncommercial status of a station is not one of the enumerated factors ordinarily considered in assessing short-spacing waiver requests, it clearly was of critical decisional significance in this instance. In the case of commercial stations, the Commission is not sympathetic to short-spacing waiver requests based solely upon the station's desire to provide better service to a city other than the city of license. See West Michigan Telecasters, Inc., 22 F.C.C.2d 943 (1970) aff'd sub nom. West Michigan Telecasters, Inc. v. FCC, 460 F.2d 883 (D.C. Cir. 1972); Satellite Outreach Ministries, 47 R.R.2d 1381 (Broadcast Bur. 1980). In this case, however, the Commission did grant a waiver based upon University's (not SCC's) stated need to provide public television service to a wide area and especially in Colorado Springs.

17. Through the proposed channel exchange, University now seeks to assign to a commercial entity the construction permit and accompanying waiver that it received based on its non-commercial status and which the commercial station could not have received if it had filed in its own name. Thus, the scheme using the proposed channel exchange would undercut the basis on which the construction permit was originally granted and would create a short-spacing that the Commission would not have authorized. Accordingly, Commission

approval of the channel exchange transaction is far from assured.

IV. IN ANY EVENT CWC HAS DEMONSTRATED THAT
A WAIVER OF SECTION 73.610 IS WARRANTED

A. CWC Has Demonstrated that Equivalent Protection Would Be Provided and that There Would Be No Objectionable Interference.

18. Even if the University's construction permit were viable, CWC has convincingly demonstrated that a waiver of the Commission's spacing rules is warranted. CWC has demonstrated that it will provide equivalent protection to University's proposed facilities. See Exhibit 1. It is clear that if CWC had filed an application for full facilities at the Laramie reference point, that application necessarily would have been acceptable without a waiver despite the short-spacing to the facilities authorized in University's construction permit. The construction permit was granted on the basis, among other things, that University would provide equivalent protection to a future Laramie station on Channel *8. Here, CWC has demonstrated that the 28 dBu interfering contour from its proposed facilities would fall entirely within the 28 dBu contour of a hypothetical station with maximum facilities at the reference point. Further, the predicted interference area produced by CWC's proposed operation is actually smaller than that which would be produced by hypothetical stations operating with full facilities at either the Laramie reference co-ordinates or a fully-spaced site. See Exhibit 1. Thus, CWC will provide greater than equivalent protection to University's proposed facilities. While a slight additional short-spacing is now proposed, it is not

the full 15.7 kilometers discussed by the University and SCC but rather only the difference of 2.3 kilometers (1.43 miles) between the clearly acceptable spacing at the reference point and the spacing at CWC's proposed site. See Exhibit 1.

19. Furthermore, there would be no objectionable interference because of the mountainous terrain that lies between University's Cheyenne Mountain site and CWC's proposed site. University itself, in obtaining its own waiver, argued that this terrain shielding would eliminate the possibility of objectionable interference. Indeed, in its letter granting University's construction permit, the Commission specifically notes that University had stated "that the terrain north and west of the proposed site is mountainous toward both Grand Junction and Laramie and that no objectionable interference will result." See Exhibit 8. Therefore, opposing CWC, after having successfully made the same argument of terrain shielding, smacks of an abuse of process.⁷ University cannot have it both ways, first arguing that there would be no interference to obtain its own construction permit and then arguing that CWC's proposed site, only 2.3 kilometers closer, would cause objectionable interference.

20. Furthermore, University and SCC claim in their Joint Petition to Deny that CWC's proposed facilities would cause interference in an area which includes Denver and its surrounding

⁷ CWC recognizes that the Joint Petition was, in fact, the result of SCC's commercial desires and that the petition was in fact prepared and paid for by SCC.